

EXCESSION FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 SONNY RAY HARDAWAY, ) No. C 12-5885 RMW (PR)  
12 v. Plaintiff, ) ORDER DENYING MOTION TO  
13 ) DECLARE PLAINTIFF A  
14 ) VEXATIOUS LITIGANT  
15 Y. FRANCO, ) (Docket No. 16.)  
16 Defendant. )

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17 Plaintiff, a state prisoner proceeding *pro se*, filed an amended federal civil rights  
18 complaint pursuant to 42 U.S.C. § 1983. The court ordered service upon defendant. Defendant  
19 has filed a motion to declare plaintiff a vexatious litigant and impose a pre-filing order against  
20 him.<sup>1</sup> Although given an opportunity, plaintiff has not filed an opposition. For the reasons  
21 stated below, defendant's motion is DENIED.

22 **DISCUSSION**

23 Defendants move to have plaintiff declared a vexatious litigant based on his repeated  
24 filings in this and in other federal and state civil cases in which plaintiff is a party, usually as a  
25 plaintiff. In particular, defendants seek an order declaring plaintiff a vexatious litigant, requiring  
26 him to demonstrate the merits of any potential lawsuit before being permitted to file a complaint.

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28 <sup>1</sup> Defendant has also filed a request for judicial notice. The request is GRANTED.

1       The Ninth Circuit recognizes “the inherent power of federal courts to regulate the  
 2 activities of abusive litigants by imposing carefully tailored restrictions under appropriate  
 3 circumstances.” De Long v. Hennessey, 912 F.2d 1144, 1146 (9th Cir. 1990). A request to  
 4 declare a party a vexatious litigant entails consideration of four factors: (1) the party must have  
 5 had adequate notice and an opportunity to oppose the order; (2) there must be an adequate record  
 6 for review, including a list of all cases and motions that led the court to conclude that a vexatious  
 7 litigant order was necessary; (3) the court must make a substantive finding as to the frivolous or  
 8 harassing nature of the litigant’s actions; and (4) the order must be narrowly tailored to fit the  
 9 particular problem involved. Id. at 1147-48. “[P]re-filing orders are an extreme remedy that  
 10 should rarely be used . . . because such sanctions can tread on a litigant’s due process right of  
 11 access to the courts.” Id. “Nevertheless, ‘[f]lagrant abuse of the judicial process cannot be  
 12 tolerated because it enables one person to preempt the use of judicial time that properly could be  
 13 used to consider the meritorious claims of other litigants.’” Moski v. Evergreen Dynasty Corp.,  
 14 500 F.3d 1047, 1057 (9th Cir. 2007) (quoting De Long, 912 F.3d at 1148).

15       There can be no legitimate dispute that plaintiff is an abusive litigant. The record in the  
 16 various federal and state civil actions involving plaintiff, spanning over 17 years, is littered with  
 17 his repeated motions and other requests in which he accuses a variety of defendants of  
 18 committing wrongs against him. “To determine whether the litigation is frivolous, district courts  
 19 must look at both the number and content of the filings as indicia of the frivolousness of the  
 20 litigant’s claims,” to make a substantive finding as to the plaintiff’s actions. Ringgold-Lockhart  
 21 v. County of Los Angeles, No. 11-57231, 2014 WL 3805579, at \*4 (9th Cir. 2014).  
 22 Alternatively, the court may make an alternative finding that the plaintiff’s filings “show a  
 23 pattern of harassment.” Id. at \*5 (quoting De Long, 912 F.3d at 1148.)

24       Here, although defendant asserts that plaintiff’s current case is frivolous, the Ninth  
 25 Circuit has not decided that dismissal solely for failure to exhaust administrative remedies is a  
 26 dismissal on the basis of frivolity. O’Neal v. Price, 531 F.3d 1146, 1155 n.9 (9th Cir. 2007). In  
 27 addition, although plaintiff most certainly is litigious, litigiousness alone is not enough to justify  
 28 a pre-filing order. See Moy v. United States, 906 F.2d 467, 470 (9th Cir. 1990). Defendant has

1 attached a binder full of plaintiff's initiated lawsuits to support his motion. However, regarding  
 2 the first eleven cases (Defs.' Req. Jud. Not., Exs. B-L), defendant only provides a copy of the  
 3 docket sheet, which does not include a copy of the complaint or final order. Without either  
 4 document, the court cannot determine whether any of plaintiff's claims were "patently without  
 5 merit." Id. at 470. In addition, there are at least three cases in defendant's exhibit list which  
 6 appear to demonstrate that plaintiff had at least three cases dismissed without prejudice for  
 7 failing to pay the filing fee or a completed application to proceed in forma pauperis. (Id., Exs.  
 8 M-2, N-2, T-2.) A dismissal for failing to pay the filing fee or a completed application to  
 9 proceed in forma pauperis is not akin to a dismissal for frivolity or failure to state a claim.  
 10 Although plaintiff is most certainly litigious, a review of a sampling of defendant's exhibits  
 11 reveals that there does not appear to be an inordinate number of frivolous complaints.  
 12 Alternatively, out of the more than forty cases filed by plaintiff in the United States District  
 13 Courts that were cited by defendant in support of his motion, it does not appear that defendant  
 14 was a party to any of the actions in which plaintiff submitted the offending filings and thus, there  
 15 is not a pattern of harassment.

16 Finally, defendant's request that the vexatious litigant order apply to any new litigation in  
 17 this district is not narrowly-tailored to prevent his abusive behavior. See De Long, 912 F.2d at  
 18 1147; see, e.g., Moy, 906 F.2d at 470 (concluding that court order preventing plaintiff from  
 19 filing any actions without leave of court was overly broad where plaintiff had only been overly  
 20 litigious to the same group of defendants).

21 In light of the concerns expressed above, defendant's motion for an order declaring  
 22 plaintiff a vexatious litigant is DENIED. Plaintiff is warned, however, that he has no right to file  
 23 frivolous and harassing lawsuits or motions, and that doing so violates Rule 11 of the Federal  
 24 Rule of Civil Procedure. Rule 11 applies equally to attorneys and pro se litigants alike. Warren  
 25 v. Guelker, 29 F.3d 1386, 1390 (9th Cir. 1994).

26 **CONCLUSION**

27 Defendant's motion to declare plaintiff a vexatious litigant is DENIED.  
 28

1 IT IS SO ORDERED.  
2 DATED: 10/01/14

  
RONALD M. WHYTE  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

SONNY RAY HARDAWAY,

Case Number: CV12-05885 RMW

Plaintiff,

**CERTIFICATE OF SERVICE**

v.

Y. FRANCO et al,

Defendant.

/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 21, 2014, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Sonny Ray Hardaway P-45579  
Salinas Valley State Prison  
B2-217  
PO Box 1050  
Soledad, CA 93960

Dated: August 21, 2014

Richard W. Wiking, Clerk  
By: Jackie Lynn Garcia, Deputy Clerk